

NTSB Order No. EA-3966

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of August, 1993

Respondent .

Docket SE-11943

The Administrator has appealed from Administrative Law Judge William R. Mullins' November 6, 1991 oral decision to dismiss the Administrator's complaint in this proceeding for lack of prosecution.¹ Because we agree with the Administrator that the

¹In an order dated June 6, 1991, the Administrator alleged that respondent had, in violation of section 61.37(a)(5) of the Federal Aviation Regulations, "FAR," 14 CFR Part 61, used unauthorized material or aid while taking a Flight Engineer Turbojet 727 written examination. The Administrator sought revocation of respondent's Airline Transport Pilot certificate

law judge abused his discretion in dismissing the matter, instead of granting the Administrator's request for a continuance, when a subpoenaed witness failed to appear on the date scheduled for an evidentiary hearing on the complaint, we will grant the appeal and remand the case for further proceedings.²

The facts relevant to this appeal can be briefly stated: On the day of the hearing in Los Angeles a witness critical to the Administrator's case-in-chief did not appear at the appointed time (10 a.m.) and had not arrived at the hearing site within the following 45 or 50 minutes, during which time the witness' place of employment in Van Nuys advised that he had left to attend the hearing at about 8:30 a.m. and presumably was en route. In response to the law judge's suggestion that the case should be dismissed, counsel for the Administrator, who had already pointed out to the law judge that the witness had been reminded of the hearing date the day before, speculated that the witness was probably delayed in traffic, advised the law judge that the witness had agreed to appear and had been subpoenaed to do so, and requested that the matter be continued since the witness' nonappearance was not attributable to anything the Administrator had done or failed to do.³ The law judge denied the request,

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(No. 2207921) and any other airman certificate held by him. The order of revocation became the complaint following the respondent's appeal of the order to the Board. See Section 821.31(a) of the Board's rules of practice, 49 CFR Part 821.

²A copy of the hearing transcript containing the decision to dismiss is attached.

³Counsel for the respondent, who had unsuccessfully

observing in effect that he had been "more than gracious" to have waited for the witness for over 15 minutes, and, as noted, dismissed the case.

We agree with the Administrator that he had shown good cause for a continuance and that the law judge abused his discretion in denying one. The record reveals no basis for concluding that the respondent would have been significantly inconvenienced, much less prejudiced, had a continuance been ordered; indeed, the respondent by counsel on November 5 had himself sought to have the matter postponed to a time at which he could personally appear to defend against the Administrator's complaint.

Moreover, since the Administrator appears to have been diligent in his efforts to secure the attendance of, apparently, the only witness he intended to call, it is difficult to perceive any justification for the law judge's conclusion that the matter should be terminated for want of prosecution.⁴ This is not to suggest, of course, that dismissal of the Administrator's complaint, for want of evidence, would necessarily have been

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requested a continuance a day earlier when he learned that his client could not attend the hearing, opposed the Administrator's request for a continuance.

⁴In a brief reply opposing the appeal, respondent suggests that we should not find that the Administrator exercised due diligence because "the only evidence before the court is the statement of the counsel." We do not think that statements of counsel concerning their efforts to meet the procedural requirements of our rules, or to answer the questions of a law judge about matters of procedure, must or should be disregarded as unsworn testimony. Rather, we think that where, as here, there is no reason to question the veracity of representations made to a law judge, they may be accepted and relied upon, subject, of course, to subsequent verification if challenged.

inappropriate had he failed to undertake such measures as would assure the appearance of a critical witness. The Administrator does, after all, bear the burden of proof in an enforcement action. Since, however, there is no indication of such a failure here, the fact that the Administrator could not proceed without the absent witness provided no support for the law judge's ruling.

The Administrator's appeal touches on an even more troubling aspect of the law judge's disposition; namely, its disregard of the Administrator's reliance on the Board's process (i.e. issuance of a subpoena) to effectuate his right, under Section 821.38 of the Board's rules of practice, to present evidence in support of his case. It seems to us that the law judge was required, in the circumstances, to continue the case until the reason for the witness' noncompliance with his subpoena could be ascertained, at which time either a new hearing could be scheduled, if the noncompliance were unintentional, unavoidable, or otherwise excusable, or, at the Administrator's request, enforcement of the subpoena in the courts could be initiated, if the failure to comply was purposeful.⁵ Given all these considerations, the law judge's failure to continue the case was plainly an abuse of discretion.

⁵Compare, Administrator v. Dunsmore, 5 NTSB 769, 771 (1985)(refusal to grant continuance to secure, at most, corroborative testimony from subpoenaed witness sustained).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The decision of the law judge is reversed; and
3. The case is remanded for further proceedings consistent with this opinion and order.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.